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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 613

O. L. SHANNON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (S. R. 21-27) [1] is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on January 15, 1954 (S. R. 27), and a petition for a rehearing was denied on February 3, 1954 (S. R. 28-36). The petition for a writ of certiorari was filed on March 2, 1954. The jurisdiction of this

[1] "S.R." refers to Volume II, the supplemental transcript of record. "R." will refer to Volume I of the record.

Court is invoked under 28 U. S. C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether the evidence proved petitioner's criminal intent to steal and convert grain of the Commodity Credit Corporation stored in his warehouse.

2. Whether the storage agreement made petitioner a bailee, rather than the owner, of the grain stored by the Commodity Credit Corporation, so that petitioner could be convicted for the theft and conversion of Commodity's grain.

3. Whether certain remarks in the prosecutor's closing argument required reversal of the conviction.

STATUTES INVOLVED

Section 15(c) of the Commodity Credit Corporation Charter Act, Public Law 806, 80th Cong., 62 Stat. 1070, 15 U. S. C. (1946 ed., Supp. V), 714m(c) provides:

> Whoever shall wilfully steal, conceal, remove, dispose of, or convert to his own use or to that of another any property owned or held by, or mortgaged or pledged to, the Corporation, shall, upon conviction thereof, be punished by a fine of not more than $10,000 or by imprisonment for not more than five years, or both.

Volume 16, Vernon's Civil Statutes of Texas, Article 5645, provides:

> If goods are of a perishable nature, or by keeping will deteriorate greatly in value, or

by their odor, leakage, inflammability, or explosive nature, will be liable to injure other property, the warehouseman may give such notice to the owner, or to the person in whose name the goods are stored, as is reasonable and possible under the circumstances, to satisfy the lien upon such goods, and to remove them from the warehouse, and in the event of the failure of such person to satisfy the lien and to remove the goods within the time so specified, the warehouseman may sell the goods at public or private sale without advertising. If the warehouseman after a reasonable effort is unable to sell such goods, he may dispose of them in any lawful manner, and shall incur no liability by reason thereof. The proceeds of any sale made upon the terms of this article shall be disposed of in the same way as the proceeds of sales made under the terms of Article 5644.

Volume 16, Vernon's Civil Statutes of Texas, Article 5644, subsection 4, provides:

> * * * From the proceeds of such sale, the warehouseman shall satisfy his lien * * *. The balance, if any, of such proceeds shall be deposited with the county clerk of the county in which the warehouse is located and shall be delivered, on demand, to the person to whom the warehouseman would have been bound to deliver, or justified in delivering the goods, for which the receipt was issued. * * *

STATEMENT

Petitioner was charged in an indictment of 47 counts in the United States District Court for the

Northern District of Texas with violations of Secsion 15(c) of the Commodity Credit Corporation Charter Act (*supra*, p. 2), in that on certain days in May, June and July 1951 he did knowingly and wilfully steal and convert to his own use large amounts of grain sorghum and wheat,[2] which were the property of the Commodity Credit Corporation, an agency of the United States within the Department of Agriculture (R. 1-22). Six counts were dismissed by the Government at the start of the trial (R. 53-54), and the jury found petitioner guilty on the remaining counts (R. 574). He was given concurrent sentences of five years on each of 38 counts. On three other counts he was given sentences of two years to run concurrently with each other, and he was fined $5,000 on each such count. The execution of the two-year sentences was suspended and he was placed on probation as to these sentences under certain conditions, the probation to begin after completion of the concurrent five-year sentences. (R. 578.) On appeal (R. 38-40), the conviction was unanimously affirmed (S. R. 27).

The evidence may be summarized as follows:

Petitioner was a warehouseman who operated under the name of Shannon Elevator in Sudan, Texas; well over 90% of the grain warehoused in his facilities was stored for the Commodity Credit Corporation (hereafter called Commodity). He entered into Uniform Grain Storage Agreements with Commodity (Gov. Ex. 1, 2, 3), dated June 1,

[2] Only counts 46 and 47 dealt with wheat (R. 22).

1949, July 1, 1949 and June 1, 1950 respectively. (S. R. 3-19, R. 57-58.) The last of these contracts (S. R. 11-19) provided in paragraph 6 for the commingling of the grain stored in the warehouse; in paragraph 7(a) it provided that "With respect to the grain stored commingled, the warehouseman shall at all times maintain in the warehouse indicated on the warehouse receipts and in which the grain was originally deposited for storage a stock of grain of the quantity, class, grade, and quality which he is obligated to deliver under the warehouse receipts;" and in paragraph 11(a) it provided further that the warehouseman "shall upon surrender of warehouse receipts representing the grain stored in such elevator(s) or warehouse(s), when so requested by Commodity, deliver the grain."

Witness Weaver, a Department of Agriculture accountant, testified as to the total quantities of undelivered grain sorghum or wheat represented by warehouse receipts issued by petitioner and acquired by Commodity through matured loans, direct purchases or otherwise, as of the particular date in each count of the indictment (R. 87-91). He also testified that the total quantities of grain sorghum and wheat, represented by warehouse receipts issued by petitioner and acquired by Commodity, upon which delivery had not been made, were 30,631,405 pounds and 37,676.95 bushels, respectively (R. 96).

The Government proved with respect to each of the undismissed counts specific shipments of grain

by petitioner from Sudan, Texas, to N. K. Parrish, Uhlmann Elevators Company, Transit Grain Company, and Rock Island Grain Company (R. 103-128). Commodity did not at any time issue the required order to load out any of these shipments to the parties named (R. 133-137).

John Bachmann, a Department of Agriculture accountant who examined petitioner's books and records, testified that after October 15, 1949, petitioner was never in a "long" position, since from that date on his grain inventories were less than his obligations to deliver (R. 144-145, 152-153). Bachmann also testified, as of the date of each of the undismissed counts, regarding petitioner's shortages. Showing what percentage of grain sorghum or wheat stored in petitioner's warehouse belonged to Commodity on each date (in all instances over 95%), and applying these percentages to the shipments proved to N. K. Parrish, Uhlmann Elevators Company, Transit Grain Company, and Rock Island Grain Company, he stated the amount of grain in each such shipment which was owned by Commodity. (R. 153-170.)

In an invoice covering the period from January 1, 1951, through June 30, 1951 (Gov. Ex. 32), petitioner made a claim against Commodity for $41,111.17 in storage charges (R. 389-394, 435). On August 18, 1951, J. W. Mize, a Department of Agriculture auditor, went to petitioner's warehouse to measure the quantity of his grain to see if there was enough on hand to cover his outstanding storage commitments. Mize testified that on August 20 petitioner told him that "he was short of grain

and that he wondered if it wouldn't be possible for me to forget about measuring his inventory at that time," but Mize replied that he could not, and proceeded to ascertain petitioner's grain shortage. (R. 444-450.) About August 22 Commodity ordered petitioner not to load out any more grain except to it (R. 346-347). Meanwhile, however, on Sunday night, August 19, petitioner had succeeded in delivering a large shipment of grain to a Sudan feed company (R. 347, 473, 478). Petitioner's business went into receivership on November 24, 1951 (R. 69).

Petitioner testified that in the spring of 1951 he knew of his grain shortage, and that he could not fill the Commodity orders after he ran out of grain (R. 336). He at first denied, but lated confirmed, that he had signed a written statement dated August 27, 1951, admitting that he had sold Commodity grain to a designated list of persons and concerns (R. 336-338, 386, 399-400).

ARGUMENT

1. There is no merit in petitioner's contention that under Article 5645 of Vernon's Civil Statutes of Texas (*supra*, pp. 2-3) he could take steps to sell grain to prevent damage or spoilage, and that, therefore, he could not have intended to steal or convert the grain stored with him by Commodity (Pet. 14-20).[3] There was no showing that petitioner complied with Article 5645 or had any idea

[3] It should be remembered that petitioner was not convicted of stealing or converting any of the relatively small amounts of grain damaged or spoiled while in storage at his warehouse. See R. 576.

that he was doing so. That article requires the warehouseman to give reasonable notice to the owner of the property to satisfy the lien upon the stored perishable or dangerous goods and to remove them from the warehouse. It provides that if the owner does not do so, the warehouseman may sell the goods at public or private sale and apply the proceeds in accordance with Article 5644 (*supra*, p. 3), which provides in subsection 4 that out of the proceeds the warehouseman shall satisfy his lien and expenses and deposit the balance with the county clerk for delivery to the person to whom the warehouseman would have been bound to deliver the goods. Here, however, petitioner did not give notice to Commodity to satisfy his lien upon the grain and to remove it from the warehouse, nor was an attempt made to turn over a cash balance to Commodity after the satisfaction of any warehouseman's lien. [4]

The court's instruction clearly required criminal intent on the part of petitioner before he could be convicted (R. 567). See *Morissette* v. *United States*, 342 U. S. 246. Such intent was inferable from his continuous large-scale sales of Commodity's grain at a time when he was cognizant of a serious shortage in his inventory. As the

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[4] The letter petitioner claims he wrote to Commodity notifying it of damage to the stored grain by a flood in June 1951 (R. 349, 182) was not compliance with Article 5645, and did not mention enforcement of a warehouseman's lien. Petitioner, moreover, did not have a copy of this alleged letter, and the jury, in determining his credibility, may well have disbelieved that there was such a letter.

trial court aptly stated before pronouncing sentence (R. 577-578):

"[Petitioner] had denied criminal intent, and yet at the very time the inspector for Commodity Credit Corporation was out there on the grounds in August of 1951, he was hurriedly, and as I would confidently suppose, at night moving large quantities of grain, and abnormal quantities of grain, out of those facilities. No wonder the jury took no stock in the disclaimer of any criminal intent."

2. Petitioner contends that under the Uniform Grain Storage Agreement of June 1, 1950 (S. R. 11-19) he was the owner, not the bailee, of Commodity's stored grain, with the consequence that he could not be convicted for wilful conversion or theft (Pet. 20-39). He invokes in this connection cases involving contracts under which a warehouseman has a clear option either to return the goods stored, or to deliver other merchantable goods together with a payment of any difference in value.[5] But the argument is without substance, and the cases petitioner cites are irrelevant, since the contract involved here gave him no such option.

A reading of the contract makes it clear that petitioner did not become the owner of Commodity's stored grain, but merely a warehouseman bailee for hire. The title of the agreement shows that it is for "storage." Paragraph 3 recites that Commodity desires that the storage facilities, which

[5] *E.G., Stricklin* v. *Rice*, 141 S. W. 2d 748 (Tex. Civ. App.); *Kansas Flour Mills* v. *Board of Commissioners*, 124 Kan. 312, 259 Pac. 795.

the warehouseman represents he has in paragraph 2, be made available with respect to grain "owned by" Commodity. Paragraph 5 provides that the grain stored by the warehouseman shall be "loaded out and shipped as requested by the *owner* [plainly Commodity and not petitioner, who is described in the same paragraph as "the warehouseman"] * * * in accordance with the provisions of this agreement." (Emphasis added.) Paragraph 7 (a) provides that "With respect to the grain stored commingled, the warehouseman shall at all times maintain in the warehouse indicated on the warehouse receipts and in which the grain was originally deposited for storage a stock of grain of the quantity, class, grade and quality which he is obliged to deliver under the warehouse receipts." Paragraph 11(a) provides that the warehouseman "shall upon surrender of warehouse receipts representing the grain stored in such elevator(s) or warehouse(s), when so requested by Commodity, deliver the grain." Paragraphs 17 and 18 provide for a schedule of applicable rates and the payment of charges by Commodity to the warehouseman, showing further that the latter was not the owner of the stored goods under the contract.[6]

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[6] Paragraphs 11 and 13 of the contract, upon which petitioner relies, do not give rise to an option on his part. Under paragraph 11 the warehouseman's primary duty is to "load out" the stored grain upon Commodity's request, and only after the loading and inspection does the question arise as to a settlement between the warehouseman and Commodity regarding quality deficiencies. Paragraph 11(b)(ii) refers to paragraph 13, which shows that whatever option is provided for is given to Commodity. Section 13(a)(ii) provides that "Commodity shall have the election to reject grain not meeting

Dawson v. *United States,* 203 F. 2d 201 (C. A. 5), upon which the court below relied, is directly in point; it involved the same type of conviction and a contract apparently identical to the one in the instant case. In *Dawson* the court, interpreting the contract, held (203 F. 2d at 203) that the convicted defendant clearly "was not making an agreement for the storage of grain to be purchased by him, and that he only held the grain in trust as bailee for the holders of the warehouse receipts."[7]

3. Finally, petitioner complains that certain allegedly prejudicial remarks by the prosecutor in his closing argument constitute reversible error (Pet. 39-43). In the first incident the prosecutor called upon the jury to decide whether petitioner stole

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the applicable requirements of section 11, but the warehouseman shall pay Commodity the value of the grain which should have been delivered rather than replacing such rejected grain." Consequently, before the warehouseman is to pay Commodity any money, Commodity must exercise its election to accept or reject the tendered grain. In the event of rejection, the obligation (not the privilege or right) of the warehouseman arises to pay the value.

It should be noted that the two purchases of grain by petitioner, from Commodity on March 24 and 29, 1951, for which he paid $106,032.52 and $27,269.01, respectively (R. 244, 245, 247), were not settlements for deficiencies in quality or quantity of grain in deliveries pursuant to loading orders under paragraphs 11 and 13. These were transactions in which Commodity made direct sales to petitioner of grain in "flat storage" (R. 270).

[7] The anomaly of petitioner's asserting ownership of the grain stored by Commodity, and at the same time claiming $41,111.17 in storage charges from Commodity (R. 389-394, 435), is at once apparent. That petitioner was aware that he was not the owner of the stored goods is shown by his testimony (R. 332): "Q. Isn't it your understanding of the contract that all they required for you to do was to give them back what they stored with you and paid storage charges on? A. That's right."

the grain "bought by his government, paid for by you." Petitioner objected to the remark as inflammatory, the court in effect sustained the objection by directing the prosecutor to cast his argument differently, and the prosecutor acquiesced. (R. 516.) In the second instance the prosecutor, in referring to the facility with which character witnesses may be obtained, stated: "Judas Iscariot had a very good reputation before he sold his Lord. Alger Hiss had some awful good character witnesses, some of the best." Petitioner's objection to this statement was sustained and his counsel was apparently satisfied with the ruling. (R. 521.) In the last incident, the prosecutor inadvertently referred to the fact that Mr. Bowlin, one of petitioner's attorneys, had stated in his argument that the Government must show a criminal intent at the time petitioner "stole" the grain, whereas Bowlin had actually used the word "sold" (R. 550-551, 527).[8] This remark apparently seemed so trivial at the time, however, that no objection was made, and the point was raised for the first time on appeal.

Petitioner now argues that the judge should have gone beyond sustaining the objections which were made and should have instructed the jury to disregard the remarks, including the one not objected

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[8] Cf. *Jarvis* v. *United States*, 90 F. 2d 243, 246 (C. A. 1), certiorari denied, 302 U. S. 705: "In long and complicated trials it is not uncommon for counsel arguing to the jury to make unintentional misstatements of fact. When this occurs it is the duty of opposing counsel to call attention to the misstatement and request the court to instruct the jury to disregard it."

to. But since counsel seemed content with the ruling at the time, the argument comes too late on appeal. Rule 30, F. R. Crim. P.; cf. *Crumpton* v. *United States,* 138 U. S. 361, 364; *United States* v. *Socony-Vacuum Oil Company,* 310 U. S. 150, 238-239. In any event, as the court below held (R. 26-27), petitioner's guilt was so overwhelmingly shown by the evidence that these minor incidents are clearly not substantial error. *Kotteakos* v. *United States,* 328 U. S. 750, 764; *Lutwak* v. *United States,* 344 U. S. 604, 619-620; Rule 52 (a), F. R. Crim. P.

CONCLUSION

The case was correctly decided in accordance with established legal principles, and there is no question warranting further review by this Court. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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